

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Duke and King Acquisition Corp.	Case No. 10-38652 Chapter 11 Case
Debtor.	
Duke and King Missouri, LLC	Case No. 10-38653 Chapter 11 Case
Debtor.	
Duke and King Missouri Holdings, Inc.	Case No. 10-38654 Chapter 11 Case
Debtor.	
Duke and King Real Estate, LLC	Case No. 10-38655 Chapter 11 Case
Debtor.	
DK Florida Holdings, Inc.	Case No. 10-38656 Chapter 11 Case
Debtor.	

**NOTICE OF HEARING AND JOINT MOTION FOR AN EXPEDITED HEARING AND
FOR AN ORDER AUTHORIZING DEBTORS TO PAY PREPETITION WAGES AND
EMPLOYEE BENEFITS AND AUTHORIZING BANKS AND FINANCIAL
INSTITUTIONS TO HONOR AND PROCESS CHECKS AND TRANSFERS RELATED TO
SUCH RELIEF**

TO: The Office of the United States Trustee and Other Parties in Interest as Specified in Local Rule 9013.

1. The above-captioned debtors and debtors in possession (collectively, the "Debtors") hereby move this Court for the relief requested below and give notice of hearing.
2. The Court will hold a hearing on this Motion at a time and location that have not been determined. The Debtors will request that the Court hold the hearing on December 7, 2010, in the Federal Courthouse in either Minneapolis, Minnesota or St. Paul, Minnesota. The Debtors will provide separate notice of the time and location of the hearing. Alternatively, parties-in-interest may contact Debtors' counsel for hearing information.

3. Local Rule 9006-1(b) provides deadlines for responses to this Motion. However, given the expedited nature of the relief sought, the Debtors do not object to written responses being served and filed immediately prior to the hearing. **UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.**

4. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334, Rule 5005 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) and Local Rules 1070-1 and 1073-1. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue of the Debtors’ chapter 11 cases and this Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409. The petitions commencing these chapter 11 cases were filed on December 4, 2010 (the “Petition Date”). The cases are currently pending in this Court.

5. This Motion arises under 11 U.S.C. §§ 105(a), 363, 549, and 507(a)(3) and (4), and is filed pursuant to Local Rules 9013-1 through 3. Expedited relief is requested pursuant to Bankruptcy Rule 9006(c) and Local Rule 9006-1(d). Notice of the hearing on this Motion is provided pursuant to Bankruptcy Rule 2002(a) and Local Rules 9013-3 and 2002-1(b). The Debtors request an order of this Court granting an expedited hearing and authorizing them to pay and continue prepetition accrued and unpaid employee expense wages and benefits in an amount not to exceed the statutory cap established by sections 507(a)(4) and (5) of the Bankruptcy Code.

BACKGROUND

6. On the Petition Date, each of the Debtors filed a voluntary petition for relief under chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §§ 101-1532 (the “Bankruptcy Code”). The Debtors have continued in possession of their property and are managing their business as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

7. As of the Petition Date, the Debtors operate 92 separate franchise locations: 39 in Minnesota; 28 in Missouri; 17 in Illinois; 12 in Wisconsin; 3 in Iowa; and 1 in Kansas.

8. Duke and King Acquisition Corp. (“D&K Acquisition”) was formed in November 2006, to acquire 88 Burger King franchise restaurants from the Nath Companies (“Nath”). The acquisition was funded by approximately \$11.2 million in equity contributions from Kinderhook Capital Fund I and \$17 million of debt provided by Bank of America, N.A. (“BofA”). At the time of the acquisition, Burger King Corporation (“BKC”) and Kinderhook Industries (“Kinderhook”) recognized that the stores being purchased were significantly behind on both successor and CAPEX commitments. Notwithstanding the significant CAPEX requirements, D&K Acquisition decided to move forward with the Nath acquisition, based in part, on guidance from BKC that there would be opportunities in the near future to bolster its platform with additional acquisitions. The Nath acquisition also included 12 restaurants in Florida which D&K Acquisition planned on divesting shortly after closing the transaction so that it could focus on its core Midwest market.¹

9. Shortly after the Nath acquisition, D&K Acquisition formed Duke and King Missouri, LLC (“D&K Missouri” and with D&K Acquisition, the “Company”) to purchase 24 restaurants in Missouri, known at the time as the Swisshelm Group (“Swisshelm”). Like the Nath restaurants, the Swisshelm assets were in poor condition and were also in need of significant operational and capital improvements. For example, in the first six months following the Swisshelm acquisition, 20 of the 23 regional managers and three of the four area managers were replaced in that market. This high turnover, while ultimately improving on-going operations, initially hurt productivity and added significant replacement and training costs.

¹ In July 2007, D&K Acquisition sold four of the 12 Florida restaurants purchased as part of the Nath acquisition. Ten months later, BKC acquired seven of the Company’s remaining Florida locations and converted them to corporate stores.

Additionally, the CAPEX required to bring the stores to acceptable conditions exceeded original estimates by over 140%. If D&K Missouri had not purchased the Swisshelm locations, there was a high probability that the majority of the 24 stores would have been closed or converted to another concept.

10. After the Swisshelm acquisition, the Company continued to seek additional growth opportunities in an effort to “average in” low CAPEX and “clean EBITDA” to bolster the overall strength and value of its portfolio. In May 2007, the Company signed a letter of intent to purchase 66 restaurants from Simmonds Restaurants in the Omaha and Des Moines markets. However, BKC did not approve the Company’s purchase of the Omaha and Des Moines markets. Unfortunately, this development set back the Company’s business plan and handcuffed its ability to “average in” better-conditioned stores with advantageous operating results. Its plan to use cash flow from stronger locations to fund CAPEX at older restaurants could not, as a result, work. The Company was left with increasingly troubled assets requiring high CAPEX dollars without the ability to leverage better performing stores.

11. The need to spend CAPEX dollars has been a constant drain on the Company. Since its inception, the Company has reinvested all of its excess cash flow into the restaurants and spent over \$8.75 million on CAPEX (\$4.0 million in 2007, \$1.9 million in 2008, \$2.3 million in 2009 and approximately \$600 thousand year-to-date in 2010). Moreover, to meet additional CAPEX obligations, the Company performed sale-leasebacks of all of its real property holdings – 10 stores in 2008 and 3 stores in 2009 — generating approximately \$13.3 million. Of that amount, approximately \$10.5 million was used to pay down debt and approximately \$2.8 million was reinvested in the restaurants.

12. The Company’s chapter 11 filing is driven by both macroeconomic factors and the Company’s acute short-term liquidity problems. The Company finds itself in a situation in

which its growth opportunity is limited by economic reality and its agreements with Burger King. The prolonged recession has greatly reduced customer traffic in its stores, driving down cash flow. In short, the Company's year-to-date financials have fallen short of projections. For the eleven periods² ended November 4, 2010, sales are \$81.7 million, which is \$5.4 million short of projections. Through this fiscal year, the BKC system has experienced same store sales declines for the past several quarters. Over the past four periods, the Company has experienced sales declines of 4.4% (period 8), 10% (period 9), 2.7% (period 10), 5.2% (period 11) and 11.1% (period 12 to date). Furthermore, through period eleven, the Company's same store sales are down 4.0% from 2009. Restaurant margins have come under increased pressure with the impacts of winter weather, value promotions such as the "\$1 Double Cheeseburger" and fluctuations in commodity prices, which have contributed to a decline in EBITDAR (Earnings before Interest, Taxes, Depreciation, Amortization and Rent) of over 9% in the past two years. Although the Company continues to maintain a high level of operating efficiency, and 90% of its restaurants have received "excellent" or "good" ratings from BKC, operating margins have not been sufficient to meet the restaurants' required CAPEX.

13. Earlier this year, as it addressed its liquidity problems, the Company was sued by BKC for breach of post-termination obligations under certain of BKC's franchise agreements. The litigation was resolved by the Company executing a Limited License Agreement with BKC, which, among other things, requires a sale of 52 of the Company's franchise locations on or before December 30, 2010. After that date, the Company's rights under 52 of their BKC franchise agreements will terminate, absent an extension from BKC.

14. Since October, 2010, the Company has been working on a short-term solution of its liquidity issues with BKC, as well as a long-term plan that would align the Company with

² The Company uses "periods" rather than "months" in its financial reporting. A "period" is equal to 4 weeks.

BKC's new vision for improving the Burger King brand name. The Company also reached out to BofA to discuss the Company's financial condition. The Company, BKC and BofA (and their respective advisors) met several times leading up to the Petition Date. As a result of these meetings, the parties agreed to a deferral of principal and interest payments to BofA and the deferral of franchise, advertising and royalty fees to BKC. Among other conditions, and similar to the requirement of the Limited License Agreement, the Company was required to engage the services of an investment banker to market the assets and sell the business. The Company has retained an investment banker who has commenced a professional process to find a buyer or buyers for the business in order to maximize the value of the enterprise. Through the parties' collaborative efforts, the Company was able to continue to operate until a consensual long-term deal could be finalized. However, the Company's acute cash needs — obligations to BofA, BKC, landlords and vendors — coupled with lagging revenues and the beginning of the Company's slow season, necessitated a filing under chapter 11 of the Bankruptcy Code in order to preserve the value of the business. The filing will also provide time and liquidity to market and sell the business.

15. D&K Acquisition and its subsidiaries included in the chapter 11 filing are all borrowers under the credit facility with BofA. D&K Acquisition and its subsidiaries fall into the following categories:

Operating Companies

16. Duke and King Acquisition Corp. Headquartered in Burnsville, MN, it is a Delaware corporation and 100% owner of both Duke and King Missouri Holdings, Inc. and DK Florida Holdings, Inc. It employs senior executive management and operates restaurants in Minnesota, Wisconsin, Iowa and Illinois.

17. Duke and King Missouri, LLC. Headquartered in Burnsville, MN, it is a Delaware limited liability company and operates restaurants in Missouri and Kansas, but is wholly owned by Duke and King Missouri Holdings, Inc.

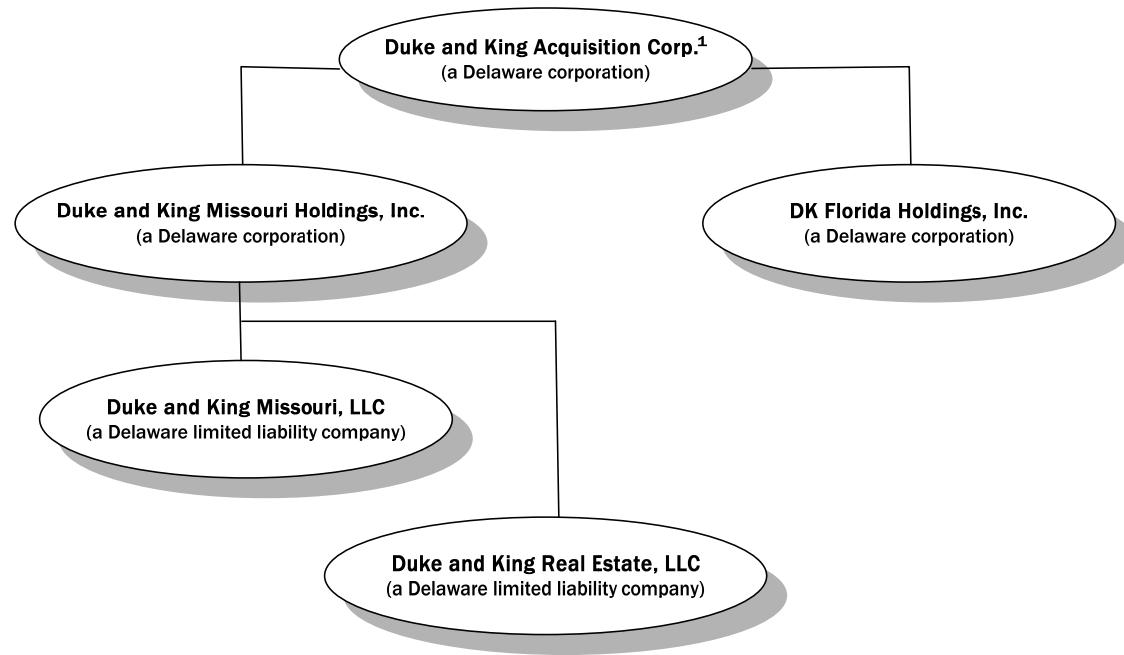
Holding Companies

18. Duke and King Missouri Holdings, Inc. It is a Delaware corporation holding company that owns 100% of D&K Missouri.

19. DK Florida Holdings, Inc. It is a Delaware corporation that serves as a holding company that formerly owned 100% of DK Florida, LLC (which was cancelled in September 2009).

20. Duke and King Real Estate, LLC. It is a Delaware limited liability company that used to own real estate in fee for certain locations, but divested itself of those holdings as of 2009.

21. A chart depicting the Debtors' organizational structure is as follows:



¹Duke and King Acquisition Corp. is 100% owned by Duke and King Holdings, Inc.

22. The Debtors' primary secured financing is through a credit facility with BofA, with obligations totaling approximately \$11,000,000 as of December 1, 2010.

RELIEF REQUESTED

23. In the ordinary course of their business operations, the Debtors directly employ, at any one time, approximately 2,200 individuals at locations across six states.³ Those individuals employed by the Debtors work in various capacities, including corporate management and support, area and in-store management, shift supervision, and counter staff or crew (collectively, the "Employees"). Of the Debtors' active Employees, approximately 265 are salaried Employees (the "Salaried Employees") and the remaining Employees are hourly Employees (the "Hourly Employees").

24. The Debtors pay wages and other compensation to their Employees on a bi-weekly basis and in alternating weeks⁴, resulting in 26 pay periods per year for a given Employee. The Debtors' aggregate gross payroll per pay period for all Employees including wages, salaries, other forms of compensation and payroll tax obligations averages approximately \$1,200,000⁵. For purposes of administration and distribution of payroll, the Debtors utilize Automatic Data Processing, Inc. as their payroll servicing provider for their Employees (the "Payroll Provider"). The Debtors remit gross payroll amounts, which includes the employee portion of all federal and state withholding taxes, employer's share of federal, state and local taxes, as well as voluntary and non-voluntary Employee deductions (including 401(k) contributions), to the Payroll Provider on a weekly basis.

³ The Debtors maintain and run franchise locations in Minnesota, Missouri, Illinois, Wisconsin, Iowa and Kansas.

⁴ In example, if the Minnesota Employees are paid on the first Friday of any particular month, the Missouri and Illinois Employees are paid on the subsequent Friday. Therefore, in any given month, the Debtors are issuing payroll checks on a weekly basis.

⁵ Average payroll may fluctuate slightly based upon Employee attrition, which is not atypical in the Debtors' industry.

25. The Debtors' pay period for their Employees typically begins on Friday and ends on the second Thursday thereafter (the "Pay Period"). Employee wages are customarily paid on the first Friday following the end of an Employee Pay Period (or 8 days after the end of a Pay Period) (the "Pay Day"). As of December 2, 2010, the Debtors owe approximately \$1,035,000 to their Employees on account of accrued, but unpaid wages, salaries, other compensation, and payroll tax obligations (collectively, the "Unpaid Wages and Salaries"). The Debtors fund the entirety of wages earned during the Pay Period to the Payroll Provider on the Wednesday prior to each Pay Day. None of the Employees are owed amounts in excess of the \$11,725 priority claim cap under section 507(a)(4) of the Bankruptcy Code.

26. In addition to wages, the Debtors, in the ordinary course of their business operations, provide Employees with access to a number of benefits including, without limitation: (i) medical, dental and health benefits, (ii) short and long term disability insurance, (iii) an Employee 401(k) savings plan, and (iv) a cafeteria plan for medical and dependent care reimbursement (collectively, the "Employee Benefits"). The approximate monthly cost to the Debtors for the Employee Benefits is as follows:

Employee Benefit	Benefit Funding	Approx. Monthly Cost (\$)
Flex 125 Administration	Debtor(s) paid	\$125.00
COBRA Administration	Debtor(s) paid	\$210.00
401(k) Administration (One America)	Debtor(s) paid	\$255.00
Medical Insurance (Medica)	Debtor(s)/Employee Split (60/40)	\$35,977.00
Medical Insurance (Medica)	Debtor(s)/Employee Split (52/48)	\$27,622.00
Dental Insurance (Delta)	Debtor(s)/Employee Split (60/40)	\$9,155.00

Medical Insurance (Cigna)	Employee paid	\$0.00 ⁶
Life Insurance (Hartford)	Debtor(s)/Employee Split 50/50	\$626.00
Long-Term Disability (Hartford)	Debtor(s)/Employee Split 50/50	\$1,988.00
Short-Term Disability (Hartford)	Debtor(s)/Employee Split 50/50	\$3,054.00

27. The Debtors also provide Salaried Employees and Hourly Employee with paid vacation and, in some instances, paid sick days (collectively, "Paid Time Off"). In general, Paid Time Off is based upon an Employee's years of service with the Debtors, with those most-senior Employees receiving a maximum of 27 days of Paid Time Off. The Debtors estimate that accrued, prepetition Paid Time Off totals \$377,000. The Debtors request permission to continue their Paid Time Off policies in the ordinary course, including honoring Paid Time Off accrued by Employees prepetition.

28. Given the Debtors' use of the Payroll Provider, described above, the Debtors do not directly withhold any amounts from Employee wages and salaries, nor do they directly remit any withheld amounts, or required federal, state or local taxes associated with the wages and salaries, to the appropriate taxing authorities. The Payroll Provider is directly responsible for the withholding of all required taxes and deductions and the remittance of same to all appropriate governmental authorities and third parties.

29. The Debtors' intent is to continue to utilize the Payroll Provider postpetition, in the ordinary course of business and in the same manner as utilized prepetition, in accordance with the terms of their respective agreements with the Payroll Provider.⁷

⁶ Cigna Medical Insurance is a program offered to Hourly Employees in which the monthly premium is fully funded by those Hourly Employees that elect to participate in the program (the "Cigna Program"). Although the Debtors are not responsible for the monthly costs of the Cigna Program, the Debtors withhold Hourly Employee funds relating to the Cigna Program and remit such funds on a monthly basis. The Debtors estimate that approximately \$16,500 of premiums are paid on account of the Cigna Program each month.

30. The Employees perform a variety of critical tasks, including daily staffing and local management of the Debtors' various restaurant locations, as well as provide direct services for the Debtors' customers. The Employees' knowledge and understanding of the Debtors' operations and customer relations are essential to the effective restructuring of the Debtors' businesses. Without the continued services of the Employees, an effective restructuring of the Debtors will not be possible.

31. If prepetition wage, compensation, benefit and reimbursement amounts are not received by the Employees in the ordinary course, they will suffer extreme personal hardship and, in many cases, will be unable to pay their basic living expenses. Such a result would destroy Employee morale and result in unmanageable Employee turnover, causing immediate and pervasive damage to the Debtors' ongoing business operations, thereby resulting in immediate and irreparable harm to the Debtors and their estates.

32. To facilitate the relief sought herein, the Debtors seek authority, in their discretion to: (a) continue to maintain and provide all Employee Benefits provided by the Debtors in the ordinary course; and (b) pay all costs and expenses required to be paid under, or incident to, the Employee Benefits to the extent any amounts accrued prepetition and/or accrued postpetition but related to the period prior to the Petition Date.

33. The Debtors also seek authority, in their discretion, and without the need for further Court approval, to modify, cancel, discontinue and/or replace any policies, plans, offerings or programs relating to Employee Benefits as they deem appropriate, and to pay any amounts necessary to effect such modification, cancellation, discontinuance or replacement in the ordinary course of business without the need for further Court approval.

⁷ The Debtors intend to utilize the Payroll Provider postpetition is not to be interpreted as a concession by the Debtors that their agreements with the Payroll Provider are executory contracts and/or that the Debtors' intend to assume the agreements with the Payroll Provider pursuant to section 365 of the Bankruptcy Code. The Debtors specifically reserve all rights under section 365 of the Bankruptcy Code.

34. Finally, the Debtors seek entry of an order authorizing and directing banks and other financial institutions to receive, process, honor and pay all checks presented for payment and electronic payments related to the foregoing Employee Benefits, irrespective of whether such checks were presented, or electronic payment requests submitted, prior to or after the Petition Date.

35. Pursuant to Local Rule 9013-2(a), this Motion is verified and is accompanied by a Memorandum, a Proposed Order and proof of service.

36. Pursuant to Local Rule 9013-2(c), the Debtors give notice that they may, if necessary, call Becky Moldenhauer, the Chief Financial Officer of the Debtors, to testify regarding the facts underlying this Motion. Her business address is 12281 Nicolett Avenue, Burnsville, MN 55337.

WHEREFORE, Debtors move the Court for an order

- a. granting expedited relief;
- b. authorizing them to pay accrued and unpaid employee wages and benefits;
- c. authorizing them to pay incidental benefits, including paid time off, in the ordinary course of business;
- d. authorizing them to continue to maintain Employee Benefits in the ordinary course of business;
- e. authorizing them to modify, cancel, discontinue and/or replace any policies, plans, offerings or programs relating to Employee Benefits as they deem appropriate, and to pay any amounts necessary to effect such modification, cancellation, discontinuance or replacement in the ordinary course of business without the need for further Court approval;
- f. authorizing and directing banks that maintain Debtors' payroll and operating accounts to honor checks or fund transfer requests to pay the other obligations described herein; and

g. granting such other and further relief as the court may deem just and equitable.

FREDRIKSON & BYRON, P.A.

Dated: December 4, 2010

/s/ Clinton E. Cutler

Clinton E. Cutler (#158094)
Douglas W. Kasseebaum (#386802)
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402
Phone (612) 492-7000
Fax (612) 492-7077
ccutler@fredlaw.com
dkassebaum@fredlaw.com

PROPOSED CO-COUNSEL TO DEBTORS
AND DEBTORS IN POSSESSION

– and –

McDONALD HOPKINS LLC

Shawn M. Riley (OH 0037235)
Scott N. Opincar (OH 0064027
Michael J. Kaczka (OH 0076548)
600 Superior Avenue, East, Suite 2100
Cleveland, OH 44114-2653
Phone (216) 348-5400
Fax (216) 348-5474
sriley@mcdonaldhopkins.com
sopincar@mcdonaldhopkins.com
mkaczka@mcdonaldhopkins.com

PROPOSED CO-COUNSEL FOR DEBTORS
AND DEBTORS IN POSSESSION

VERIFICATION

I, Becky Moldenhauer, am the Chief Financial Officer of the Debtors. Based upon my personal information and belief, I declare under penalty of perjury that the facts set forth in paragraphs 6-30 of the preceding Motion are true and correct, according to the best of my knowledge, information and belief.

Dated: December 4, 2010

Signed: Becky Moldenhauer
Becky Moldenhauer

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Duke and King Acquisition Corp.	Case No. 10-38652 Chapter 11 Case
Duke and King Missouri, LLC Debtor.	Case No. 10-38653 Chapter 11 Case
Duke and King Missouri Holdings, Inc. Debtor.	Case No. 10-38654 Chapter 11 Case
Duke and King Real Estate, LLC Debtor.	Case No. 10-38655 Chapter 11 Case
DK Florida Holdings, Inc. Debtor.	Case No. 10-38656 Chapter 11 Case

MEMORANDUM OF LAW IN SUPPORT OF JOINT MOTION FOR AN EXPEDITED HEARING AND FOR AN ORDER AUTHORIZING DEBTORS TO PAY PREPETITION WAGES AND EMPLOYEE BENEFITS AND AUTHORIZING BANKS AND FINANCIAL INSTITUTIONS TO HONOR AND PROCESS CHECKS AND TRANSFERS RELATED TO SUCH RELIEF

The above debtors and debtors in possession (collectively, "Debtors") seek entry of an order authorizing them to pay accrued prepetition wages and employee benefits. The Motion should be granted because the Debtors have a compelling business justification for paying these obligations. Namely, the Debtors will lose the goodwill of their employees and may lose permanently the employees if these payments are not made. Thus, the payment of these claims is important to the Debtors' ongoing operations and effective resolution of these cases.

BACKGROUND

The facts in support of this memorandum are set forth in the verified Motion.⁸

⁸ Capitalized terms used, but not otherwise defined, have the meanings given to them in the Motion.

LEGAL ANALYSIS

I. THE COURT HAS AUTHORITY TO APPROVE A POSTPETITION PAYMENT OF A PREPETITION CLAIM.

Nowhere in the Bankruptcy Code is a debtor expressly prohibited from making postpetition payment of a prepetition claim, as the Debtors propose to do here. Two provisions of the Bankruptcy Code, however, suggest that obtaining court approval is required or, at least, prudent. Section 363(b) of the Bankruptcy Code provides that after notice and a hearing, the debtor may use property of the estate other than in the ordinary course of business. And section 549 of the Bankruptcy Code allows a debtor to avoid the postpetition transfer of property that is not authorized by the Bankruptcy Code or by the court. Thus, the Bankruptcy Code, including these provisions, establishes this Court's authority to approve a postpetition payment of a prepetition claim, as the Debtors propose here.

A. The Bankruptcy Code Authorizes Payment of Certain Prepetition Claims.

Section 363 of the Bankruptcy Code allows a debtor to pay claims not in the ordinary course of business, with court authorization. It is in the ordinary course of business for a company to pay wages, salaries, and employee benefits. See In re Tusa-Expo Holdings, Inc., 2008 WL 4857954 (Bankr. N.D. Tex. 2008). Several courts have suggested, however, that satisfaction of such an obligation that accrued prepetition is not in the ordinary course, and therefore requires court approval. See In re K-Mart Corp., 359 F.3d 866, 872 (7th Cir. 2004); In re Ionosphere Clubs, Inc., 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989). Chapter 11 practice in this District and elsewhere has also generally accepted this understanding, and debtors frequently request court authorization to pay wages, salaries and employee benefits that accrued prepetition.

Paying employee claims that accrued prepetition, like any other use of property outside the ordinary course of business, is appropriate if the debtor demonstrates a “business justification” for making such payments. As stated by the court in the Ionosphere Clubs case, [s]ection 363(b) gives the court broad flexibility in tailoring its orders to meet a wide variety of circumstances. However, the debtor must articulate some business justification, other than mere appeasement of major creditors, for using, selling or leasing property out of the ordinary course of business, before the court may permit such disposition under section 363(b).

In re Ionosphere Clubs, Inc., 98 B.R. at 175 (citations omitted); see also Michigan Bureau of Workers' Disability Compensation v. Chateaugay Corp. (In re Chateaugay Corp.), 80 B.R. 279, 281 (Bankr. S.D.N.Y. 1987) (noting that court allowed the debtor to continue payment of prepetition wages and salary, and other benefits with an aggregate value exceeding \$250,000,000 because it was consistent with the debtor’s “imperatives”). Payment of prepetition claims is appropriate when payment will help to “stabilize [the] debtor’s business relationships without significantly hurting any party.” Russell A. Eisenberg and Frances F. Gecker. The Doctrine of Necessity and its Parameters, 73 Marq. L. Rev. 1 (1989); see also In re UNR Industries, Inc., 143 B.R. 506, 520 (Bankr. N.D. Ill. 1992).

Thus, where a debtor can establish the above factors, a court should approve the postpetition payment of prepetition accrued employee wages and benefits and commissions.

B. The Code Recognizes the “Doctrine of Necessity,” which Authorizes Payment of Certain Prepetition Claims.

The “doctrine of necessity” recognizes that in certain circumstances it is in the best interest of all concerned to pay certain prepetition creditors out of turn, as an inducement to them to continue working for, or doing business with, the debtor. See Miltenberger v. Logansport, 106 U.S. 286 (1882). As the above citation indicates, this doctrine predicated the Bankruptcy Code by many years. Nonetheless, the idea that it is in the best interests of all concerned to pay

such claims as are necessary to keep the debtor in business, and to keep the debtor in business and its employees in wage-paying jobs has survived and has been recognized under the Bankruptcy Code. See, e.g., In re Payless Cashways, Inc., 268 B.R. 543 (Bankr. W.D. Mo. 2001); In re Just For Feet, 242 B.R. 821 (D. Del. 1999); In re Equal Net Communications Corp., 258 B.R. 368 (Bankr. S.D. Tex. 2000); In re Gulf Air, Inc., 112 B.R. 152 (Bankr. W.D. La. 1989); In re Ionosphere Clubs, Inc., supra. Furthermore, in applying the “doctrine of necessity,” courts have relied on section 105 of the Bankruptcy Code. Section 105(a) of the Bankruptcy Code grants the court authority to issue any order “necessary or appropriate to carry out the provisions” of the Bankruptcy Code, and also provides a basis for authorizing the debtor to pay accrued prepetition wages, salary and benefits. See In re Ionosphere Clubs, Inc., 98 B.R. at 175; In re Quality Interiors, Inc., 127 B.R. 391, 396 (Bankr. N.D. Ohio 1991).

Thus, the Bankruptcy Code furnishes a basis for postpetition payment of prepetition claims in the right circumstances. This is true notwithstanding the decision in the case of In re K-Mart Corp., 359 F.3d 866 (7th Cir. 2004). In K-Mart, the court questioned whether the bankruptcy court had authority to approve payments to “critical vendors.” In that case, the appellate court ruled that the court had not established its authority to do so. In so ruling, however, the court also recognized that section 363(b) of the Bankruptcy Code might provide a basis for authorizing such payments in the right circumstance. In re K-Mart Corp., 359 F.3d at 872. The court suggested that to justify a request for authority to pay prepetition claims, the debtor should demonstrate that it will suffer damage if the payment is not made,⁹ and that other creditors will be as well-off with the payment as without. Id. Where a debtor can make such a

⁹ The K-Mart case dealt with payment to critical vendors, and the court suggested that the debtor would need to make a showing that vendors not paid for prepetition deliveries will refuse to make postpetition deliveries. In the employee situation, an analogous damage to the Debtors would be the risk of employees terminating their employment or harboring ill-will which adversely affects performance or operations. Such factors are present here.

showing, it appears that even the Seventh Circuit would overcome its skepticism and allow postpetition payment of a prepetition claim.

Moreover, as the court recently recognized in In re Tusa-Expo Holdings, employees are not situated similarly with other unsecured creditors, such as “critical vendors.” Congress has given a preferred status to employee claims in section 507(a)(4) and (5) of the Bankruptcy Code, and payment of these claims in advance of dealing with claims of lesser status does not disadvantage unsecured creditors. Id. at *2. Even though the wage motion in Tusa-Expo was not opposed, the court deemed it important “that a prospective chapter 11 debtor be confident that, absent a question as to whether continuation of its operations is appropriate, prepetition wage and benefit obligations will continue during chapter 11 to be honored on a timely basis...it would be an abuse of discretion not to grant the payment of the priority prepetition wages within the statutory limit...” Id. at *1.

II. POSTPETITION PAYMENT OF PREPETITION CLAIMS IS APPROPRIATE IN THESE CASES.

In applying the provisions of the Bankruptcy Code and the “doctrine of necessity” discussed above, the Court should be guided by practicality and common sense. In re Payless Cashways, 268 B.R. at 546. This is particularly important when the Court considers payment to employees whose livelihood depends on a debtor’s payments. Courts have long recognized the importance of maintaining the goodwill of employees. In LTV Corp. v. Aetna Cas. & Sur. Co. (In re Chateaugay Corp.), 116 B.R. 887, 898 (Bankr. S.D.N.Y. 1990), the court stated:

Additionally, employee good will and contentment in an asset which is vital to the continuation of a debtor’s operation and its ability to effectively reorganize during the Chapter 11 process.

As the court noted in Tusa-Expo:

Clearly a debtor’s employees are among those creditors with whom the debtor must deal. Absent competent personnel, it is

doubtful that any debtor would be able to operate its business as contemplated by Code section 1108... [A]s a practical matter, no debtor can afford to lose very many of its employees, especially in a chapter 11 case's early days... Second, continuity of conduct of business is important in a newly filed Chapter 11 case.... Employees familiar with the debtor's operations will be essential to [all of the early case responsibilities.... Third, even if employees remain with a debtor notwithstanding non-payment of prepetition wages and benefits, it is probable that their work would be [adversely] affected by their loss of income.

In the Debtors' cases, employees are the core of their operations. If payment of wages and benefits are postponed to the close of the case, the Debtors' going-concern value will be threatened by employee losses and a severe disruption to restaurant services. To the extent the Debtors' operations suffer, creditors also suffer and estate assets will be diminished. It is in the best interest of creditors that wages and benefits be paid to employees to maintain their good will. The issue is really one of timing of payment, and creditors are not harmed; rather, they will benefit by payment as Debtors propose.

[Remainder of page intentionally left blank.]

CONCLUSION

The proposed payments are supported by a good business justification and are consistent with the priority scheme designed by Congress. In this case, even the stringent requirements of the K-Mart decision are met. For these reasons, this Court should enter an order authorizing Debtors to pay the accrued prepetition employee wages and benefits set out in the motion, and Debtors request that the Court enter an order authorizing such payment.

FREDRIKSON & BYRON, P.A.

Dated: December 4, 2010

/s/ Clinton E. Cutler

Clinton E. Cutler (#158094)
Douglas W. Kassebaum (#386802)
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402
Phone (612) 492-7000
Fax (612) 492-7077
ccutler@fredlaw.com
dkassebaum@fredlaw.com

PROPOSED CO-COUNSEL TO DEBTORS
AND DEBTORS IN POSSESSION

– and –

McDONALD HOPKINS LLC

Shawn M. Riley (OH 0037235)
Scott N. Opincar (OH 0064027
Michael J. Kaczka (OH 0076548)
600 Superior Avenue, East, Suite 2100
Cleveland, OH 44114-2653
Phone (216) 348-5400
Fax (216) 348-5474
sriley@mcdonaldhopkins.com
sopincar@mcdonaldhopkins.com
mkaczka@mcdonaldhopkins.com

PROPOSED CO-COUNSEL FOR DEBTORS
AND DEBTORS IN POSSESSION

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Duke and King Acquisition Corp.	Case No. 10-38652 Chapter 11 Case
Debtor.	
Duke and King Missouri, LLC	Case No. 10-38653
Debtor.	Chapter 11 Case
Duke and King Missouri Holdings, Inc.	Case No. 10-38654
Debtor.	Chapter 11 Case
Duke and King Real Estate, LLC	Case No. 10-38655
Debtor.	Chapter 11 Case
DK Florida Holdings, Inc.	Case No. 10-38656
Debtor.	Chapter 11 Case

CERTIFICATE OF SERVICE

Douglas W. Kassebaum, under penalty of perjury, states that on December 4, 2010, he caused to be served the following:

1. **Notice of Intention to Seek Expedited Hearing;**
2. **Declaration of Relatedness of Chapter 11 Cases;**
3. **Notice of Hearing and Joint Motion for (I) Expedited Relief and (II) Interim and Final Orders (A) Authorizing Debtors' Use of Unencumbered Cash or, in the Alternative, Cash Collateral and (B) Granting Adequate Protection;**
4. Memorandum of Law in Support of Joint Motion for (I) Expedited Relief, and (II) Interim and Final Orders (A) Authorizing Debtors' Use of Unencumbered Cash or, in the Alternative, Cash Collateral and (B) Granting Adequate Protection;
5. Proposed Interim Order;
6. Proposed Final Order;
7. **Notice of Motion and Joint Motion for an Expedited Hearing and for an Order Authorizing Debtors to Pay Prepetition Wages and Employee Benefits and Authorizing Banks and Financial Institutions to Honor and Process Checks and Transfers Related to Such Relief;**

8. Memorandum of Law in Support of Joint Motion for an Expedited Hearing and for an Order Authorizing Debtors to Pay Prepetition Wages and Employee Benefits and Authorizing Banks and Financial Institutions to Honor and Process Checks and Transfers Related to Such Relief;
9. Proposed Order;
10. **Notice of Hearing and Joint Motion for Order (I) Granting Expedited Relief, (II) Authorizing Maintenance of Existing Bank Accounts and Business Forms, (III) Authorizing Continued Use of Cash Management System, and (IV) Waiving the Requirements of 11 U.S.C. § 345(B);**
11. Memorandum in Support of Joint Motion for Order (I) Granting Expedited Relief, (II) Authorizing Maintenance of Existing Bank Accounts and Business Forms, (III) Authorizing Continued Use of Cash Management System, and (IV) Waiving the Requirements of 11 U.S.C. § 345(B);
12. Proposed Order;
13. **Notice of Motion and Joint Motion for Expedited Hearing and Authorizing Debtors to Pay Prepetition Taxes and Fees and Authorizing and Directing Financial Institutions to Honor and Process Checks and Transfers Related to Such Relief;**
14. Memorandum of Law in Support of Joint Motion for Expedited Hearing and Authorizing Debtors to Pay Prepetition Taxes and Fees and Authorizing and Directing Financial Institutions to Honor and Process Checks and Transfers Related to Such Relief;
15. Proposed Order
16. **Notice of Hearing and Joint Motion for Expedited Hearing and for an Order Authorizing Debtors to Pay the Prepetition Claims of Certain Critical Vendors;**
17. Memorandum of Law in Support of Joint Motion for Expedited Hearing and for an Order Authorizing Debtors to Pay the Prepetition Claims of Certain Critical Vendors;
18. Proposed Order;
19. **Notice of Hearing and Joint Motion for Expedited Relief and for Order Authorizing Debtors to Honor Certain Prepetition Programs to Customer Programs;**
20. Memorandum in Support of Joint Motion for Expedited Relief and for Order Authorizing Debtors to Honor Certain Prepetition Programs to Customer Programs;

21. Proposed Order;
22. **Notice of Hearing and Joint Motion for Order (I) Granting Expedited Relief, (II) Authorizing Joint Administration of Cases, and (III) Restricting Service under Local Rule 9013-3(A)(2);**
23. Memorandum in Support of Notice of Hearing and Joint Motion for Order (I) Granting Expedited Relief, (II) Authorizing Joint Administration of Cases, and (III) Restricting Service under Local Rule 9013-3(A)(2);
24. Proposed Order; and
25. Certificate of Service

by sending true and correct copies to all parties on the attached Service List as indicated therein.

Dated: December 4, 2010

/s/ *Douglas W. Kassebaum*

Douglas W. Kassebaum

Duke and King Acquisition Corp. and Related Debtors - Bky No. 10-38652

FIRST DAY DOCUMENTS SERVICE LIST

Served via overnight mail except those parties whose contact information includes an e-mail address were served via e-mail

<u>US Trustee and Other Required Parties</u>		
U.S. Trustee's Office 1015 US Courthouse 300 S Fourth St Minneapolis MN 55415 ustpregion12.mn.ecf@usdoj.gov	Attorneys for Burger King Corporation Paul J. Battista Genovese Joblove & Battista, P.A. 100 Southeast Second Street, 44th Floor Miami, Florida 33131 pbattista@gjb-law.com	Attorneys for Bank of America Stephen M. Mertz Michael R. Stewart Michael F. Doty Faegre & Benson LLP 2200 Wells Fargo Center 90 South 7th Street Minneapolis, MN 55402-3901 SMertz@faegre.com MStewart@faegre.com MDoty@faegre.com
U.S. Trustee's Office 1015 US Courthouse 300 South Fourth Street Minneapolis MN 55415 robert.raschke@usdoj.gov	Swisshelm Attn: Bruce Swisshelm 3765 East Turtle Hatch Road Springfield, MO 65809	
IRS District Counsel 380 Jackson St, Ste 650 St Paul MN 55101-4804	Reinhart Foodservice LLC 230 North Front Street La Crosse, WI 54601 rerytilahti@rfsdelivers.com	Attorneys for Bank of America Wendy S. Walker Jonathan K. Bernstein Patrick D. Fleming Morgan, Lewis & Bockius LLP 101 Park Avenue New York, NY 10178-0060 wwalker@morganlewis.com jbernstein@morganlewis.com pfelemon@morganlewis.com
Internal Revenue Service Wells Fargo Place 30 E 7th St, Mail Stop 5700 St Paul MN 55101	MBM Corporation Attn: Dana Demers P.O. Box 841170 Dallas, TX 75284-1170 ddemers@mbmfoodservice.com	
MN Department of Revenue Collection Enforcement 551 Bankruptcy Section 600 North Robert Street PO Box 64447 St Paul MN 55101-2228	Sicom Systems Inc. 4140 Skyron Drive Doylestown, PA 18901 mdeily@sicom.com	Duke Manufacturing Co. Attn: Officer or Agent 2305 North Broadway Saint Louis, MO 63102 Fax No. 314-231-5074
US Attorney 600 US Courthouse 300 S Fourth St Minneapolis MN 55415	Gilbert Mechanical Cont. inc. 4451 West 76 th Street Minneapolis, MN 55435 mgoelz@gilbertmech.com	GreatAmerica Leasing Corporation Attn: Officer or Agent 625 1 st Street, SE, Suite 800 Cedar Rapids, IA 52401-2031 Fax No. 319-365-8607
Minnesota Department of Economic Security 332 Minnesota St, Ste E200 St. Paul MN 55101-1351	OI Distribution 12900 Southwest 89 th Court Miami, FL 33176 iliana@originalimpressions.com	Meadowbrook Meat Company Attn: Dana Demers 2641 Meadowbrook Road Rocky Mount, NC 27802 Fax No. 252-467-4520 ddemers@mbmfoodservice.com
<u>Debtors</u>	Pan-O-Gold Baking Co. 444 East St. Germain St. St. Cloud, MN 56304 info@panogold.com	Coca-Cola Financial Corporation Attn: Amber Meyer 1410 SW Morrison St., #750 Portland, OR 97205 amber_meyer@leasedimensions.com
<u>Debtors' 10 Largest Unsecured Creditors</u>	Legacy Enterprises Attn: John Strong 1109 S Pickwick Ave Springfield, MO 65804	Warren Capital Corporation Attn: Scott Shapiro 100 Rowland Way #205 Novato, CA 94945 Fax No. 415-892-7075
Kinderhook 521 Fifth Ave 34th Floor New York, NY 10175 ttuttle@kinderhook.com	<u>Major Secured Creditors</u>	
Burger King Corporation Attn: Frank Taylor PO Box 93290 Atlanta, GA 31193-2980 ftaylor@whopper.com	Bank of America, N.A. as Administrative Agent 600 Peachtree Street, NE, GA1-006-13-20 Atlanta, GA 30308 Fax No. 404-942-4476	

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Duke and King Acquisition Corp.	Case No. 10-38652 Chapter 11 Case
Duke and King Missouri, LLC Debtor.	Case No. 10-38653 Chapter 11 Case
Duke and King Missouri Holdings, Inc. Debtor.	Case No. 10-38654 Chapter 11 Case
Duke and King Real Estate, LLC Debtor.	Case No. 10-38655 Chapter 11 Case
DK Florida Holdings, Inc. Debtor.	Case No. 10-38656 Chapter 11 Case

**ORDER GRANTING EXPEDITED HEARING AND AUTHORIZING DEBTORS TO PAY
PREPETITION WAGES AND EMPLOYEE BENEFITS AND AUTHORIZING BANKS
AND FINANCIAL INSTITUTIONS TO HONOR AND PROCESS CHECKS AND
TRANSFERS RELATED TO SUCH RELIEF**

This case came before the court on the Debtors' Motion for an Order for Expedited Hearing and Authorizing Debtors to Pay Prepetition Wages and Employee Benefits and Authorizing Banks and Financial Institutions to Honor and Process Checks and Transfers Related to Such Relief (the "Motion"). Appearances are noted on the record.

Based on the arguments of counsel, all of the files, records and proceedings herein, the court having been advised in the premises, and the court's findings of fact and conclusions of law, if any, having been stated orally and recorded in open court following the close of evidence,

IT IS HEREBY ORDERED that:

1. The Motion for expedited relief is granted.

2. The Debtors are hereby authorized, but not directed, to pay accrued prepetition wages and salaries for the Debtors' employees, in the approximate aggregate amount of \$1,035,000 (the "Compensation Expenses").

3. The Debtors are hereby authorized, but not directed, to pay other prepetition employee benefits as described in the Motion, the aggregate of which with Compensation Expenses shall not exceed the priority dollar limit established by 11 U.S.C. §§ 507(a)(4) and (5) as to each employee (collectively with the Compensation Expenses, the "Approved Expenses").

4. The Debtors are hereby authorized, but not required, to pay any funds withheld from employee wages as directed by the employee or on the employee's behalf.

5. The Debtors are hereby authorized, but not directed, to pay for and continue all of the Employee Benefits.

6. The Debtors are hereby authorized, but not directed, to pay for and continue all of the Paid Time Off.

7. The Debtors are hereby authorized to modify, cancel, discontinue and/or replace any policies, plans, offerings or programs relating to Employee Benefits as they deem appropriate, and to pay any amounts necessary to effect such modification, cancellation, discontinuance or replacement in the ordinary course of business without the need for further Court approval.

8. The financial institutions at which Debtors maintain payroll and operating accounts are hereby authorized and directed to honor all instruments presented in payment of the Approved Expenses and Employee Benefits.

Dated:

United States Bankruptcy Judge